In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 910

BURTON MERCANTILE AND GIN COMPANY, INC.,
PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is reported at 338 F. 2d 414. The opinion of the district court is reported at 234 F. Supp. 825.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1964. The petition for a writ of certiorari was filed on February 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

767-195—65

QUESTION PRESENTED

Whether the courts below correctly held that petitioner's clerical employees, and its employees engaged in maintenance and repair work during the dormant season, are not "engaged in ginning of cotton" within the meaning of the exemption provided by Section 13(a)(18) of the Fair Labor Standards Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 63 Stat. 910, 75 Stat. 65, 29 U.S.C. 201, *et seq.* Section 13(a)(18) of that Act provides:

> SEC. 13(a) The provisions of section 6 and 7 shall not apply with respect to * * * (18) any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities; * * *

The foregoing section was added to the Act by the Fair Labor Standards Amendments of 1961 (75 Stat. 65). Prior to the effective date of the 1961 Amendments, Section 13(a)(10) of the Act provided:

> SEC. 13(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (10) any individual employed within the area of production (as defined by the Administrator * * *), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; * * *.

Section 13(a)(10) remains in the Act but the reference to "ginning" was deleted by the 1961 Amendments.

STATEMENT

The Secretary of Labor brought this action to restrain petitioner from continuing to violate the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act at its two cotton gins in Jackson County, Arkansas. The employees involved are (1) clerical workers, and (2) manual workers performing maintenance and repair work during the "dormant season" when no cotton is actually being ginned. Petitioner conceded it was not complying with the Act's requirements with respect to such employees, but contended that they were not subject to the Act by virtue of Section 13(a)(18) (and former Section 13(a)(10)), which exempts "any employee engaged in ginning of cotton."

The district court denied the exemption claim, pointing out that petitioner's clerical employees "are not 'ginning cotton;' they are keeping books," and that the mechanical employees "are not 'ginning cotton' while they are repairing and working around the gins during the dormant seasons" (234 F. Supp. at 829). The requested injunction was accordingly issued. The court of appeals, in a *per curiam* decision, concluded that the issues had been "fully considered, discussed and correctly resolved in the trial court's opinion" and unanimously affirmed on the basis of that opinion (Pet. App. 2a).

ARGUMENT

The decision below is in accord with decisions of this Court and of other courts of appeals, and presents no conflict with any relevant decisions. The decision below, also, clearly conforms with the legislative history and the consistent administrative interpretation of the applicable statutory provisions. Further review is unnecessary.

1. The correctness of the rulings below that the maintenance employees are not exempt during the dormant season is confirmed *a fortiori* by this Court's decision in *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254. It was there held that the more broadly worded overtime exemption provided by Section 7(c) of the Act for all employees "of an employer engaged in the * * * processing of * * * sugarcane * * * in any place of employment where he is so engaged" did not apply to the maintenance crew in the employer's sugar mill "[d]uring the three-month off-season [when] a complete overhaul and reconditioning is given the entire mill equipment and no processing work is performed" (349 U.S. at 270–271). "Manifestly," as the district court observed in the instant case, "if an operator of a sugar mill is not processing sugar during the mill's dormant periods, a cotton gin operator is not 'ginning cotton' during the gin's off-season, and during that season the gin employees are not 'ginning cotton'" (234 F. Supp. at 830).

The same principle is applicable to clerical workers and other employees not directly "engaged in" the exempted activity. See *Jenkins* v. *Durkin*, 208 F. 2d 941 (C.A. 5), and *Mitchell* v. *Stinson*, 217 F. 2d 210 (C.A. 1).

McComb v. *Consolidated Fisheries Co.*, 174 F. 2d 74 (C.A. 3), cited by petitioner (Pet. 5) as construing an analogous exemption in a manner contrary to the result in the instant case, is readily distinguishable. That case dealt with the former Section 13(a)(5) exemption for workers "employed in" fishery operations. In holding the exemption applicable to all employees in a seafood processing plant, the court concluded that the use of the term "employed in" (rather than "engaged in") indicated an intent to include within the exemption's scope any "employee who is 'employed' in the sense of being hired by an employer rather than in the sense of being engaged in a particular physical activity" (174 F. 2d at 77). The decision was also predicated on the extensive list of activities set out in the fisheries exemption which the court concluded was intended to be "a complete catalog of the activities involved in the fishery industry" (*ibid.*).[1] Upon this ground the decision was distinguished in *Mitchell* v. *Stinson*, *supra*, where the court pointed out that the seafood canning exemption—like the cotton ginning exemption here involved—contains "no such extensive catalogue of activities" (217 F. 2d at 216). The other two decisions

[1] The exemptive language encompassed "any employee employed in the catching, taking, harvesting, cultivating or farming of any kind of [seafood], including the going to and returning from work and including employment in the loading, unloading or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof."

cited by petitioners, *Waller* v. *Humphreys,* 133 F. 2d 193 (C.A. 5) and *Mitchell* v. *Trade Winds Co.,* 289 F. 2d 278 (C.A. 5), dealt with the same broader exemption for fishery employees and are distinguishable on the same grounds.

2. The decision below accords with the legislative history of the statutory language and the long-standing consistent administrative interpretation. The original wording of Section 13(a)(10)—which referred to "any employee * * * engaged in * * * ginning"—was adopted in preference to a proposal in the House to exempt "any person employed in connection with the ginning * * * of cotton" (82 Cong. Rec. 1776), and in the Senate to exempt "cotton ginning and baling, their employers and employees * * *" (81 Cong. Rec. 7886–7887). In view of the particular language adopted, the Wage-Hour Administrator, shortly after the Act's enactment, announced his interpretation that the applicability of Section 13 (a)(10) "depends upon the type of activity engaged in by the particular employee" (Interpretative Bulletin No. 14, issued August 21, 1939, 1942 Wage Hour Manual 415). In a later release addressed to the cotton industry the Administrator specifically stated that this exemption "applies only to those employees who are actually engaged in the specified operations," and that it "will not ordinarily apply to all the employees in your plant, among whom may be office workers, maintenance men and guards, just to mention some non-exempt classes of employees" (Release M–9,

issued February 14, 1947, 1949 Wage Hour Manual 35:56). In 1949, when Congress was considering extensive amendments to the Fair Labor Standards Act, a cotton industry spokesman complained to the appropriate committees of both Houses that the Administrator had interpreted this and another exemption affecting cotton "in a manner calculated to restrict the application of those exemptions to the fewest possible number of persons."[2] Yet, the section was not changed. The exemption for cotton ginning was governed by the congressional declaration that existing administrative interpretations of the Act's provisions which were not inconsistent with the 1949 Amendments, "shall remain in effect" (Section 16(c) of Fair Labor Standards Amendments of 1949, 63 Stat. 920). When Section 13(a)(18) was enacted as a separate exemption provision for "ginning" in 1961 (which had the effect of removing this activity from the "area of production" limitation contained in Section 13(a)(10)), substantially the same language was adopted—"any employee engaged in ginning of cotton." "The substantial reenactment * * * of the provision theretofore construed by the Department is persuasive evidence of legislative approval" of that interpretation (*Brewster* v. *Gage,* 280 U.S. 327, 337;

[2] Statemen of John H. Todd, of the National Cotton Compress and Cotton Warehouse Association, Hearings before the House Committee on Education and Labor on H.R. 2033, 81st Cong., 1st Sess., p. 916, and Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. 58, *et al.*, 81st Cong., 1st Sess., p. 675.

Helvering v. *Reynolds Co.*, 306 U.S. 110, 114–115; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366).

Finally, the ruling below accords with the settled canon that exemptions from this Act are to be narrowly construed. See *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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